Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
High-Cost Universal Service Support	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link Up	WC Docket No. 03-109
Universal Service Contribution Methodology	WC Docket No. 06-122
Numbering Resource Optimization	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68
IP-Enabled Services	WC Docket No. 04-36

COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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Department of Telecommunications and Cable

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I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable ("MDTC")[1] respectfully submits these initial comments pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission ("FCC") on November 5, 2008, and published in the Federal Register on November 12, 2008 ("Nov. 5 FNPRM").[2] In the Nov. 5 FNPRM, the FCC requests comments on the following proposals: (1) Chairman Martin's Comprehensive Draft Proposal for Intercarrier Compensation ("ICC") and Universal Service Fund ("USF") Reform circulated to the FCC on October 15, 2008, for last minute placement on the FCC's agenda for a vote on November 4, 2008 (subsequently removed from the agenda on November 3) ("Initial Reform Proposal"); (2) A Draft Narrow Universal Service Reform Proposal circulated to the FCC on October 31, 2008 ("Narrow USF Proposal); and (3) A Modified Version of Chairman Martin's Original Draft ICC and USF Reform Proposal circulated to the FCC on November 5, 2008 ("Alternate Reform Proposal") (collectively, "Nov. 5 FNPRM draft proposals").[3] The FCC also requests comment on two specific questions: (1) whether the additional cost standard utilized under § 252(d)(2) of the Act[4] should be: (i) the existing TELRIC standard; or (ii) the incremental cost standard described in the draft order; and

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[1] The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. Mass. Gen. Laws c. 25C §1.

[2] *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, and *IP-Enabled Services*, WC Docket No. 04-36; Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. November 5, 2008).

[3] Nov. 5 FNPRM, ¶ 40.

[4] The term "Act" refers to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 – 47 U.S.C. § 151 *et seq*.

(2) whether the terminating rate for all § 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company.[5] Due to the extensiveness of the proposals and timing constraints,[6] the MDTC focuses its comments primarily on what it considers the most problematic aspects of the Alternative Draft Proposal.[7] Lack of comment by the MDTC on particular aspects of the Nov. 5 FNPRM draft proposals should not be interpreted as support.

First, however, the MDTC would like to thank and commend the Commissioners for their commitment to address comprehensive ICC and USF reform; and also for their recognition of the importance of due process and transparency within the reform process and the need to provide opportunity for all interested parties to meaningfully respond to any such proposals that would have extensive market and industry ramifications. As Rep. John D. Dingell (D-MI) has aptly pointed out: "an independent agency that conducts its affairs fairly, openly, and transparently is more likely to serve the public interest than one that does not. When the process breaks down…reasoned analysis and debate suffer, and public confidence in the agency is shaken."[8] Release of the Nov. 5 FNPRM draft proposals not only represents the FCC's commitment to increased transparency and due process within its agency but also represents an important step

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[5] Nov. 5 FNPRM, ¶ 41.

[6] Excluding weekends and the Thanksgiving holiday, the total comment period is little more than 14 days from publication in the Federal Register.

[7] The Initial Reform Proposal and Alternate Reform Proposal are very similar, using the same language almost verbatim throughout, excluding a few paragraphs dealing mostly with different treatment of rate-of-return incumbent local exchange carriers ("ROR ILECs").

[8] Letter from Rep. John D. Dingell (D-MI), Chairman of the House Committee on Energy and Commerce, to Chairman Kevin J. Martin, raising concerns about a breakdown in proper procedure at the FCC and launching an inquiry by the Subcommittee on Oversight and Investigations to ensure that the agency's processes are fair, open, and transparent and serve the public interest (Dec. 3, 2007), available at http://energycommerce.house.gov/Press_110/110-ltr.120307.FCC.Martin.transparency.pdf. House Committee on Energy and Commerce's News Release in regards to the letter (Dec. 3, 2007) available at http://energycommerce.house.gov/Press_110/110nr133.shtml.

towards much-needed and final ICC and USF reform. But, this cannot be the final step. The MDTC encourages the FCC to continue with its collaborative reform approach – first, to take the time to meaningfully review the initial and reply comments submitted over the next two weeks, in addition to any prior docket filings; second, to initiate its own substantive cost studies, data gathering, and data analyses in order to better substantiate any future reforms, including estimating the financial impact of its proposals; and third, utilizing all of its gathered data and analyses, to draft a final comprehensive reform proposal that would benefit consumers and not unfairly favor one segment of the industry, and which would be put out for final, meaningful comment by interested parties before passage.[9]

II. INTERCARRIER COMPENSATION REFORM

The Alternate Reform Proposal outlines a comprehensive reform plan for intercarrier compensation.[10] Utilizing essentially the same unsupported legal rationale as that presented by the FCC in the November 5, 2008, *Order on Remand* for Internet Service Provider ("ISP")-bound traffic (hereafter, "*ISP-Remand Order II*"),[11] the Alternate Reform Proposal deems that the reciprocal compensation obligations established in § 251(b)(5) of the Act are not limited to

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[9] The MDTC concurs with the National Association of Regulatory Utility Commissioners ("NARUC") that stakeholders need to "engage in constructive and intensive discussions" and that "truly meaningful reform…***will require open minds, open discussion and a willingness to make strategic compromises which can only be reached through face-to-face discussions***." "NARUC Calls for Constructive Engagement on ICC Reform," NARUC Press Release, issued Oct. 6, 2008, available at http://www.naruc.org/News/default.cfm?pr=104 (emphasis added).

[10] Alternate Reform Proposal, ¶¶ 152-338.

[11] *In the Matter of High-Cost Universal Service Support,* WC Docket No. 05-337, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link Up,* WC Docket No. 03-109, *Universal Service Contribution Methodology,* WC Docket No. 06-122, *Numbering Resource Optimization,* CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic,* CC Docket No. 99-68, and *IP-Enabled Services,* WC Docket No. 04-36; Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. November 5, 2008) (Order on Remand hereafter "*ISP-Remand Order II*").

local traffic;[12] that all "telecommunications" traffic, including both interstate and intrastate traffic subject to access charges, is now suddenly subject to § 251(b)(5),[13] despite the FCC's own earlier "plausible" determinations to the contrary in previous Orders.[14] The Alternate Reform Proposal sets a 10-year transition period, after which time state commissions will have set a uniform termination rate cap applicable to all operating companies for all traffic.[15] The new rate cap for each state is to be established under a non-TELRIC, incremental cost standard.[16] The Alternate Reform Proposal determines that the incremental cost of call termination on modern networks is *de minimis*,[17] with the *expectation* that the caps set under the new, incremental cost standard will not exceed $.0007 per minute of use.[18] The Alternate Reform Proposal establishes specific revenue recovery opportunities for rate-of-return and price cap ILECs, but offers little guidance in regards to revenue recovery opportunities for other LECs, including mid-size ILECs and CLECs.[19] Furthermore, the Alternate Reform Proposal fails to address or create any requisite actions in the event that any carriers, namely IXCs and wireless carriers, experience any

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[12] Alternate Reform Proposal, ¶ 212; *ISP-Remand Order II*, ¶7. *See generally* Alternate Reform Proposal, ¶¶ 202-224 and *ISP-Remand Order II*, ¶¶ 7-22, for the Commission's cited legal authority.

[13] Alternate Reform Proposal, ¶ 153.

[14] Alternate Reform Proposal, ¶ 222; *ISP-Remand Order II*, ¶ 15.

[15] Alternate Reform Proposal, ¶¶ 153, 187, 191, 192.

[16] Alternate Reform Proposal, ¶¶ 153, 191, 262, 266.

[17] Alternate Reform Proposal, ¶ 250; *generally*, ¶¶ 248-256.

[18] Alternate Reform Proposal, ¶ 197; *generally*, ¶¶ 193 and 200 (where ISP-Bound traffic is to be subject to the same interim rules until state commissions establish reciprocal compensation rates at or below $.0007 per minute of use). The Alternate Reform Proposal specifies that setting an *actual* $.0007 per minute of use cap is "not currently warranted" (¶ 223).

[19] Alternate Reform Proposal, ¶¶ 289-321. The Alternate Reform Proposal specifies only that non-ILECs can recover any net loss in revenues "in any lawful manner" (¶ 297).

moderate-to-substantial *savings* as a result of lowered termination rates.[20] Finally, the Alternate Reform Proposal takes the unprecedented and unwarranted step to classify *all* IP/PSTN calls as "information services."[21]

The 10-year transition to the new, uniform terminating rate in each state occurs in three stages. During Stage 1, which has a two-year timeline, all intrastate terminating access rates are reduced to each carrier's interstate rate levels, and state commissions are to establish a statewide, interim uniform termination rate to be applied in Stage 2, utilizing any methodology that they deem appropriate in order to set the rate.[22] During Stage 2, also limited to a two-year timeline, carrier rates are reduced to the interim uniform termination rate set by each state commission in Stage 1, and the state commissions are to establish a final transition plan to the final, uniform termination rate that they establish under the new, incremental cost methodology established by the FCC.[23] During Stage 3, which has a six-year timeline, there is to be a gradual transition established by the state commission's transition plan to the uniform termination rate that will apply at the end of the transition.[24] Each operating company is to set its terminating rates at the

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[20] This is a concern also noted by the National Telecommunications Cooperative Association ("NTCA"): The draft proposals attached to the Nov. 5 FNPRM "provide AT&T, Verizon and Qwest and other IXCs and wireless carriers with a resulting annual multi-billion dollar access savings windfall with no strings attached." NTCA *Ex Parte* Notices, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Universal Service Contribution Methodology*, CC Docket 96-45; and *IP-Enabled Services*, WC Docket 04-36, at 5 (November 18 and 20, 2008).

[21] Alternate Reform Proposal, ¶ 204.

[22] Alternate Reform Proposal, ¶¶ 187, 188, 190.

[23] Alternate Reform Proposal, ¶¶ 187 and 189.

[24] Alternate Reform Proposal, ¶¶ 187, 189, 190, 192.

lower of (a) its current rate or (b) the state-set interim, uniform reciprocal compensation rate applicable at that stage of the six-year transition.[25]

The MDTC will first address its general legal concerns with the Alternate Reform Proposal. The MDTC will then focus its comments on its specific concerns with the Alternate Reform Proposal.

A. LEGAL CONCERNS

1. The FCC would act prematurely on ICC reform prior to a final determination by the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit")

Because the legal authority cited in the Alternate Reform Proposal is essentially the same as that authority cited in *ISP-Remand Order II* (to which the Alternate Reform Proposal is attached),[26] and because the D.C. Circuit has not yet deemed proper that legal authority, the FCC would act prior to a final determination by the D.C. Circuit.[27] In fact, if the FCC does issue a comprehensive ICC reform Order prior to the D.C. Circuit accepting the FCC's latest legal

[25] Alternate Reform Proposal, ¶ 191.

[26] Specifically, *ISP-Remand Order II* legal rationale in ¶¶ 7-9 corresponds to the Alternate Reform Proposal's rationale in ¶¶ 212-214; ¶¶ 10-15 (corresponds to ¶¶ 217-222); ¶16 (in part, corresponds to ¶ 215); ¶ 17 (in part, corresponds to fn 577 and ¶ 203); ¶¶ 18-20 (corresponds to ¶¶ 207-209); ¶¶ 21-22 (corresponds to ¶¶ 229-230).

[27] Both the *ISP Remand Order II* and the Alternate Reform Proposal specify that there is more than one "plausible interpretation" of § 251(b)(5) (*ISP Remand Order*, ¶ 15 and Alternate Reform Proposal, ¶ 222). They point to the broad definition of "telecommunications" in the Act and determine that "telecommunications" as it is used in § 251(b)(5) is now meant to apply to all traffic (*ISP Remand Order*, ¶ 8 and Alternate Reform Proposal, ¶ 213). They also both specify that "there is a gap in the pricing rules" in § 252(d)(2), but that the FCC may adopt rules to "fill that gap" under its § 201(b) authority (*ISP Remand Order*, ¶ 12 and Alternate Reform Proposal, ¶ 219). The Alternate Reform Proposal expands upon this and specifies that both §§ 251(b)(5) and 252(d)(2) are "broad enough to facilitate" its ICC reform plan (¶ 212), under which a new incremental cost methodology would be implemented under § 252(d)(2)'s "additional cost" standard on all § 251(b)(5) traffic (¶ 210). The Alternate Reform Proposal also determines that § 251(g), meant to be a "transitional device," permits the FCC to supercede all pre-1996 compensation regimes (¶ 215).

rationale, a procedural morass is likely to ensue. First, the D.C. Circuit could possibly again reject the legal authority provided by the FCC regarding its treatment of ISP-bound traffic.[28] Rejection of the FCC's cited legal authority for its specific treatment of ISP-bound traffic, which the FCC deems "interstate" in nature, would render invalid that same legal authority espoused by the Alternate Reform Proposal when it would be applied more generally to *all* traffic, both interstate and intrastate. Second, due to the overarching implications of applying § 251(b)(5) to all traffic in the *ISP-Remand Order II* itself, the FCC is likely to see direct appeals at the D.C. Circuit of that particular determination. Before moving forward with comprehensive reform plan, the FCC would be prudent to await the D.C. Circuit's initial determination that § 251(b)(5) may, in fact, apply to *all* traffic.

2. <u>The FCC does not have sufficient legal authority under §§ 251(b)(5), 201(b), and 251(g) to preempt states' intrastate access charge regimes</u>

The FCC does not have sufficient legal authority under §§ 251(b)(5), 201(b), and 251(g) to preempt states' intrastate access charge regimes. There may be several "plausible" readings of any statutory provision,[29] and a "plausible" reading of § 251(b)(5) (coupled with §§ 201(b) and 251(g)) is that it could apply to all *interstate* traffic. The FCC would overstep its Congressionally delegated authority if it attempted to apply § 251(b)(5) to *intrastate* traffic as well.

[28] As the FCC knows, the D.C. Circuit has already twice rejected the FCC's legal explanation for its treatment of ISP-bound traffic – (1) the D.C. Circuit first vacated and remanded the FCC's 1999 Declaratory Ruling for lack of sufficient legal explanation for its end-to-end analysis (*Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000)); and (2) the D.C. Circuit then remanded the FCC's *ISP-Remand Order* for insufficient legal authority for its interim ISP-bound traffic rules (*WorldCom, Inc. v. FCC*, 288 F.3d 429, 430, 434 (D.C. Cir. 2002)).

[29] Alternate Reform Proposal, ¶ 222; *ISP-Remand Order II*, ¶ 15.

First and foremost, as discussed by the New England Conference of Public Utilities Commissioners ("NECPUC"),[30] the FCC is expressly barred by § 152(b) "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communications service* by wire or radio of any carrier," except where Congress has clearly expressed an exception.[31] Indeed, exceptions to states' § 152(b) authority are limited.[32] Instead, § 152(b), when coupled with § 251(d)(3), specifically preserves state authority over intrastate access charge regimes.[33]

Second, as recognized by the FCC, § 251(g) preserves both sets of access charge regimes, interstate *and* intrastate;[34] under its express terms, however, the FCC may only supercede any

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[30] NECPUC Ex Parte, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122; *IP-Enabled Services*, WC Docket No. 04-36; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 7-8 (filed Oct. 17, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176113.

[31] 47 U.S.C. § 152(b) (emphasis added). For instance, § 2(c)(3) of the Act gives the FCC exclusive jurisdiction over rates and entry of wireless carriers "[n]otwithstanding sections 2(b) and 221(b)." 47 U.S.C. § 332(c)(3)(A). (Cavalier and NuVox Ex Parte, CC Docket No. 01-92, at 2 and fn 9 (filed Oct. 9, 2008)); *see also* National Association of Regulatory Utility Commissioners ("NARUC") *Ex Parte to explain (1) neither 47.U.S.C.A. § 251(b)(5) nor § 201(b) provides a basis to preempt Intrastate Access and (2) fixed interconnected VoIP services remain subject to State jurisdiction*, filed *In the Matter(s) of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption*, CC Docket No. 08-152; *IP-Enabled Services*, WC Docket No. 04-36; *Universal Service Contribution Methodology*, WC Docket 06-122; *Petition for Declaratory Ruling Filed by CTIA*, WT Docket 05-194; *Jurisdictional Separations & Referral to the Federal-State Joint Board*, CC Docket 80-286, at 4 (filed Oct. 28, 2008) ("NARUC Oct. 28 Ex Parte"), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520182241.

[32] 47 U.S.C. §§ 223-227.

[33] 47 U.S.C. § 251(d)(3): "***Preservation of State Access Regulation***: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section…" (emphasis added).

[34] The Commission acknowledged:

> Although section 251(g)…expressly preserves only the Commission's traditional policies and authority over *interstate* access services…, it nevertheless highlights an ambiguity in the scope of

pre-1996 "regulation, order, or policy *of the Commission*."[35] In other words, the FCC may not supercede any regulation, order, or policy in regards to the access charge regimes of state commissions.[36] Instead, this must be a determination arrived at by the state commissions themselves.

B. ALTERNATE REFORM PROPOSAL CONCERNS

1. Any reform plan should establish fixed VoIP as a telecommunications service

a. *Classification of fixed VoIP as an "information service" would cause irreparable harm to consumers*

A major concern for the MDTC involves the proper classification of facilities-based or "fixed" voice over internet protocol ("VoIP") services.[37] Due to ongoing technological

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> "telecommunications" subject to section 251(b)(5) – demonstrating that the term must be construed in light of other provisions in the statute. In this regard, we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999), *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); Order on Remand and Report and Order, 16 FCC Rcd 9151, 9168 (2001), *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003)("*ISP Remand Order"*)(emphasis added; footnote omitted).

[35] 47 U.S.C. § 251(g).

[36] *See* Broadview Networks, Inc., Cavalier Telephone, NuVox, and XO Communications, LLC *Ex Parte Addressing Applicability of Section 251(b)(5) to Intrastate Access Traffic*, filed in *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 4 (filed Oct. 23, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520177447.

[37] *See* MDTC Ex Parte Comments, filed in *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122; *IP-Enabled Services*, WC Docket No. 04-36; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Oct. 27, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520181016.

innovations in voice services and companies' continued migration to VoIP for their voice service offerings, any ruling that would classify facilities-based or "fixed" VoIP as an "information service" would cause irreparable harm to consumers in Massachusetts.[38] The MDTC strongly opposes any action to classify fixed VoIP as an information service for two primary reasons: (1) in light of the telecommunications industry's current transition from traditional circuit-switched technology to fixed VoIP technology, the proposed classification would preempt state regulation of nearly all residential telecommunications services in Massachusetts without any other regulation to fill the void; and (2) without regulatory authority over fixed VoIP, the MDTC will have no ability to ensure that residential telecommunications customers continue to receive the benefit of essential consumer protections that they have had when their telecommunications service used traditional circuit-switched technology. Therefore, the MDTC strongly urges the FCC to not make such a finding in any comprehensive reform order and, instead, find that fixed VoIP services are more appropriately classified as "telecommunications services."

If the FCC classified fixed VoIP as an information service, then it would be an unregulated voice service under exclusive federal jurisdiction. The Alternate Reform Proposal seeks to do just this – it would "classify as "information services" those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit switched networks and terminate them on IP networks (collectively "IP/PSTN" services)[fixed VoIP calls that touch the PSTN],"[39] and then it would expressly "preempt any state efforts to impose "traditional 'telephone company' regulations" as they relate

[38] While this analysis focuses solely on the effects in Massachusetts, it is equally applicable to other states due to providers' past and future gradual migration to integrated and IP network technology nationwide.

[39] Alternate Reform Proposal, ¶ 204 (emphasis added).

to IP/PSTN information services as inconsistent with our generally unregulated treatment of information services."[40] The Alternate Reform Proposal cites to its determinations in the *Pulver.Com Order* and *Vonage Order*,[41] even though neither of the services addressed by those decisions involves a fixed VoIP service or resembles "traditional" telephony.[42]

The telecommunications industry is transitioning from traditional, circuit-switched technology to Internet-based, VoIP technology at a rapid pace. Already, over 11 million households use VoIP service (nomadic or fixed) nationwide.[43] By 2011, over 23 million households are projected to have VoIP service. In Massachusetts, fixed VoIP telephone service is now offered by one or more cable companies in 288 communities, representing nearly 97% of the state's population. In addition, Verizon, the largest provider of telecommunications services in the Commonwealth, is actively rebuilding its network to replace copper wires with fiber-optic lines (under the trade name "FiOS"), and is widely expected to adopt fixed VoIP technology on

[40] Alternate Reform Proposal, ¶ 206.

[41] Alternate Reform Proposal, fn 526. "We determine, consistent with our precedent regarding information services, that [the service at issue] is an unregulated information service and any state regulations that seek to treat [the service] as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation (Alternate Reform Proposal, fn 526, *citing In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3316 at ¶ 15).

[42] For instance, Pulver's subscribers "can only call one another; they cannot use the service to call ordinary telephone numbers on the PSTN. Nor to Pulver subscribers receive telephone numbers on the PSTN. Nor do Pulver subscribers receive telephone numbers of their own at which they can be reached by people calling from the PSTN." Vonage's subscribers, on the other hand, utilize "a special Vonage-provided adapter, which is associated with an IP address" that has been assigned a North American Numbering Plan ("NANP") Administrator Number. The Vonage subscriber, however, is not limited to the "geographical constraints usually associated with landline telephone numbers," since the subscriber can plug in and use the adapter and phone wherever there is a broadband connection. *Digital Crossroads: American Telecommunications Policy in the Internet Age*, Jonathan E. Nuechterlein and Philip J. Weiser, The MIT Press – Cambridge, MA (2007 paperback edition).

[43] *See* TeleGeography Research Service, http://www.telegeography.com/wordpress/?p=59.

its FiOS network, which already serves 85 communities, in the near future.[44] If fixed VoIP were classified as an information service, there would be no federal or state regulation of the type of telephone service that will be used by nearly the entire population of Massachusetts in the future. Moreover, there are over 40 rural communities in Massachusetts that have only one residential landline telecommunications provider. In addition, a large number of these rural communities lack broadband, and wireless coverage is often poor due to the mountainous and tree-lined topography and is not robust enough in such areas to support "cutting the cord." In areas such as these communities, which represent large regions of Massachusetts, a landline phone is the only option. Intermodal telecommunications competition, which would serve to limit the power of a monopoly provider, simply does not exist to the same extent as in the other areas of the state. Accordingly, if the FCC were to classify fixed VoIP as an "information service," these rural communities would be served by an unregulated monopoly provider that would face little competitive pressure.

Without any regulation, consumers would lose core consumer protections that safeguard them against inadequate service and unreasonable practices.[45] These issues disproportionately affect the most vulnerable segments of the population, including those who are disabled, poor, sick, or elderly. Consumers of fixed telephone service are typically not aware of the technical

[44] *See, e.g.*, Joan Engebretson, "Voice's Place in the Fiber Future," http://www.broadbandtrends.com/News_Articles/Articles_2007/May_2007/Telephony_05212007.htm, May 21, 2007.

[45] For illustrative purposes, these protections safeguard consumers against inadequate service and unreasonable practices including (1) unjustified payments or disconnection over legitimate billing disputes; (2) extended service outages that can be life-threatening for sick and elderly citizens and can jeopardize the very survival of small and medium-sized businesses that depend on telecommunications services to function; (3) disruption to or poor quality E911 service; (4) the conscious attempt to force consumers of low and moderate means off the network altogether; (5) fraud and other unscrupulous behavior; and (6) poor quality telephone service.

differences between fixed VoIP and traditional circuit-switching, and they rightfully expect that both services will provide them with equivalent consumer protections. However, classification of fixed VoIP as an information service would preempt state regulators from extending the same consumer protections currently applicable to circuit-switched customers to fixed VoIP customers.[46] Thus, the MDTC stresses that the FCC fully consider the consequences that would result if fixed VoIP is classified as an information service and the resulting deregulation of the vast majority of residential telecommunications services.

b. *The FCC should revisit and amend its interpretations of "information service" and "telecommunications service"*

In light of the technological innovations in voice services over the past 10 years, the FCC should revisit its antiquated interpretations of "information services" versus "telecommunications services" and adapt them to a more modern services scheme. Agencies have "ample latitude to adapt [their] rules and policies *to the demands of changing circumstances*,"[47] and "changing circumstances" dictate that the FCC revisit "plausible" interpretations of an "information service" versus a "telecommunications service" under the Act.[48] Quite simply, VoIP "is becoming the new plain old telephone service ("POTS"),"[49] and the FCC should amend its regulations accordingly.

[46] By regulating fixed VoIP, the MDTC does not want to increase regulatory burdens or apply economic regulation on companies that formerly used circuit-switched technology to provide voice service. Instead, the MDTC seeks to maintain a level competitive playing field in Massachusetts and apply the same types of consumer and public policy protections as well as statutory safeguards (e.g., tariffing requirements) that all other voice providers must follow.

[47] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks omitted; emphasis added); *citing Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

[48] If, as the FCC determines, there can be several "plausible" readings of a statute (*ISP-Remand Order II*, ¶ 15), then the same holds true for statutory interpretations of the definitions of "telecommunications services" and "information services." VoIP as a "telecommunications service" is a better reading of the statute in today's marketplace.

The FCC should first revisit the statutory definitions of the two services under the Act. A "telecommunications service" is defined simply as "the offering of telecommunications for a fee directly to the public…regardless of the facilities used,"[50] whereas an "information service" is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…but does not include…the management of a telecommunications service."[51] The voice services offered by interconnected VoIP providers, where end-users utilize and pay for the service to make calls to one another, fit squarely within the simple definition of a telecommunication service.

The FCC should also update its definition of an "interconnected VoIP service" to correlate with its tentative conclusions in its *1998 Report to Congress* for "phone-to-phone IP telephony" (aka "VoIP").[52] In the *1998 Report to Congress*, the FCC tentatively determined "phone-to-phone IP telephony" would be treated as a telecommunications service if a provider satisfied the following four conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use customer premises equipment ("CPE") different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the PSTN; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international

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[49] *Federal Telecommunications Law: 2007 Supplement*, Evan Leo, Austin Schlick, and Colin Stretch, Aspen Publishers, - NY, NY – 2nd ed., at 28 (2007).

[50] 47 U.S.C. § 153(46) (emphasis added).

[51] 47 U.S.C. § 153(20) (emphasis added).

[52] *In Re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress (April 10, 1998) ("*1998 Report to Congress*"), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf.

agreements; and (4) it transmits customer information without net change in form or content.[53] Later, in its *VoIP 911 Order*, the FCC defined "interconnected VoIP services" as those that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.[54] In terms of a plausible reading of the above conditions and definition, and since a telecommunications service is a telecommunications service "regardless of the facilities used,"[55] then VoIP services should be considered telecommunications services. In fact, the FCC is already halfway to that determination, in light of the numerous requirements imposed upon VoIP providers that are typically imposed upon telecommunications service providers.[56]

Finally, any interpretation of the definition of a telecommunications versus information service should be viewed from the end-users perspective as to form and content. The MDTC agrees with the analysis presented by NARUC:

> "[a]ny narrow focus on whether a voice-in – voice out substitute for phone service performs a "net protocol conversion" should not shift the classification of the service. The conversion all these services complete results in no apparent change in the appearance or performance of the telephone service from the end user's perspective. According to the FCC, "protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no protocol conversion

[53] *1998 Report to Congress*, at ¶ 88.

[54] *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, ¶ 24 (2005)("*VoIP 911 Order*"), aff'd, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); (defining "interconnected VoIP service" in 47 C.F.R. § 9.3).

[55] 47 U.S.C. § 153(46).

[56] For instance, VoIP providers are required: (1) to have local number portability ("LNP"); (2) to provide 911 service; (3) to contribute to universal service; (4) to protect the privacy of customers; (5) to comply with disability access and telecommunications relay service requirements; and (6) to satisfy certain CALEA obligations.

> to the end user"…From an end-user perspective, the conversions that take place in a voice over IP call are no greater or lesser than conversions that take place when an analog voice signal is converted to a digital signal and transmitted over a fiber optic network, or converted again into an analog or digital radio signal and transmitted over a wireless network. A protocol simply is an agreed-upon format for transmitting data between two devices…Protocols, including IP, are simply one means by which people employ devices to engage in communication. In this instance, the medium is not the message; form does not dictate substance for the purposes of the 1996 Act."[57]

2. The FCC should be wary of any ratemaking methodology that presupposes a particular result

Any ratemaking methodology established that presupposes a final state commission determination is improper, and the FCC should be wary of establishing any such methodology. The Alternate Reform Proposal, however, does just this: it determines that the incremental cost of call termination on modern networks is *de minimis*,[58] and expects that the caps set under the new, incremental cost standard will not exceed $.0007 per minute of use.[59] This is improper. The Supreme Court has determined that the FCC's "issuance of [pricing methodology] rules" for establishment of just and reasonable rates should only "guide the state-commission judgments."[60] Under a pricing methodology and the "Pricing Standards" set forth in § 252(d), it is the States that "apply those standards and implement that methodology, determining the concrete result in particular circumstances."[61] The Supreme Court's determinations denote an expected flexibility

[57] NARUC Oct. 28 Ex Parte, at 10-11 (citations omitted).

[58] Alternate Reform Proposal, ¶ 250; *generally*, ¶¶ 248-256.

[59] Alternate Reform Proposal, ¶ 197; *generally*, ¶¶ 193 and 200 (where ISP-Bound traffic is to be subject to the same interim rules until state commissions establish reciprocal compensation rates at or below $.0007 per minute of use). The Alternate Reform Proposal specifies that setting an *actual* $.0007 per minute of use cap is "*not currently warranted*" (¶ 223) (emphasis added).

[60] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-381 (1999)(emphasis added).

[61] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999)(emphasis added).

for states when applying any pricing methodology. If the FCC, however, "adopts a "methodology" that caps the rate, sets a range of rates, or otherwise predetermines the outcome, this…would limit the state commissions' ability to set rates based upon their evaluation of costs and put the states in the position of doing little more than ratifying the Commission's rate-setting activity."[62] By predetermining that the incremental cost of call termination on modern networks is *de minimis*, expecting that any caps will not exceed $.0007 and determining that an actual $.0007 cap is "not currently warranted," the Alternate Reform Proposal does, in fact, improperly establish a rate-setting activity by the FCC, specifically, over intrastate rates and will be subject to numerous legal challenges.

Furthermore, the FCC does not have the legal authority to cap intrastate termination rates at interstate rate levels. As discussed above, the Alternate Reform Proposal sets a 10-year transition to be carried out in three stages, during which time state commissions establish interim rates and a gradual transition to the final rate during the final two stages.[63] During the first stage, however, the Alternate Reform Proposal would usurp state commission intrastate ratemaking authority by capping carriers' intrastate termination rates at their interstate levels.[64] The same legal arguments discussed above apply equally here: as upheld by the Supreme Court, § 152(b) bars the FCC from setting actual intrastate rates despite the FCC's § 201(b) authority.[65] If the

[62] Earthlink, Inc., Granite Telecommunications, LLC, PAETEC, RCN Telecom, and Zayo Group, LLC, *Ex Parte Presentation in 01-92, 99-68*, at 7 (filed Oct. 20, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176404.

[63] Alternate Reform Proposal, ¶¶ 153, 187- 192.

[64] Alternate Reform Proposal, ¶¶ 187, 188, 190.

[65] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-381 (1999); *See also Louisiana PSC v. FCC*, 476 U.S. 355 (1986) – The impossibility exception discussed in footnote 4 of this case does not apply here, since the argument is not made in the Alternate Reform Proposal and it is not impossible (or economically infeasible) to separate the interstate and intrastate components of all traffic.

FCC attempted to set and cap intrastate rates at interstate rate levels, then it would be setting actual intrastate rates in violation of its statutorily delegated authority and established Supreme Court precedent.

3. The MDTC supports a reasonable multi-year transition (1) the specific parameters of which are determined by the state commissions, and (2) which establishes appropriate separations adjustments

If a new pricing methodology is established by the FCC, then the MDTC supports a reasonable multi-year transition (at least five years) to a unified rate structure (1) the specific parameters of which are determined by the state commissions, and (2) which establishes appropriate separations adjustments. State commissions have been specifically delegated by their state legislatures to oversee and regulate telecommunications companies within their respective states.[66] In light of varying state markets and conditions, state commissions are better positioned to understand the impact of communications regulations within their respective states and to better determine how to transition to a new methodology and rate(s), based on general guidance from the FCC in order to ensure general uniformity for carriers nationwide. Furthermore, the MDTC agrees with NARUC's assertion that "[a]ny approach that eliminates intrastate access charges, on its face… requires a prior and significant adjustment of the FCC's separations rules."[67]

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[66] *See, e.g.* Mass. Gen. Laws c. 25C §1.

[67] NARUC Oct. 18 Ex Parte, at 4, *referencing* "…to the extent the FCC determines it will preempt State access charge rate policies, separations changes must occur to ensure that jurisdictional cost assignments are consistent with rate setting authority. States should not be both preempted in setting rates for a service, yet responsible for the cost recovery for that service." *See*, State Members of the Joint Board on Separations *Ex Parte*, filed *In the Matter(s) of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption*, CC Docket No. 08-152; *IP-Enabled Services*, WC Docket No. 04-36; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Universal Service Contribution Methodology*, WC

4. The MDTC lacks sufficient information to determine whether the § 252(d)(2) additional cost standard should be the existing TELRIC standard or the incremental cost standard described in the Alternate Reform Proposal

Due to the absence of corresponding data, the MDTC lacks sufficient information to determine whether the proposed § 252(d)(2) additional cost standard should be the existing TELRIC standard or the incremental cost standard proposed in the Alternate Reform Order. As a preliminary matter, the MDTC does support some form of an incremental cost standard on traffic exchanged between operating companies. However, the MDTC is hesitant to support any methodology that would replace the existing long-run incremental cost standard that has been used for more than 10 years without the FCC having provided any supporting data utilizing that methodology, especially since there is a glaring lack of data on the anticipated financial impact on carriers. In addition, the Alternate Reform Proposal offers little or no guidance (1) as to the applicability of the methodology on transit rates and network architecture,[68] and (2) as to the effects and any necessary changes on the leasing and pricing of unbundled network elements.

Docket No. 06-122; *Petition for Declaratory Ruling Filed by CTIA*, WT Docket No. 05-194; *Jurisdictional Separations & Referral to the Federal-State Joint Board*, CC Docket No. 80-286, at 4 (dated Oct. 18, 2008, and filed Oct. 20, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176237.

[68] The Alternate Reform Proposal does establish brief "default rules" regarding the network "edge" for post-transition (¶ 270). Unfortunately, the "default rules" seem geared towards a more traditional telephone network and fail to provide for connections between different types of operating companies for traffic traversing voice networks (IP/PSTN), except for the fact that carriers "are free to negotiate alternative arrangements" (fn 717). The MDTC fears that without additional safeguards, unfair pricing against competitors may occur and could potentially force carriers to conform their network architecture to match that of the ILECs.

The Supreme Court has specified that, while an agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances,"[69] the agency must also "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[70] The Alternate Reform Proposal fails to do this and, indeed, explicitly points out that "[n]o cost studies or analyses in the record…attempt to estimate the termination costs using" the new incremental cost standard.[71] Prior to moving forward with any new methodology, the FCC needs to implement or utilize dependable cost studies and data analyses rather than late-filed *Ex Partes* attempting to qualify a carrier's position on the issue, as well as more clearly address transit rates and network connection obligations.

III. USF REFORM

A. REFORM OF HIGH-COST UNIVERSAL SERVICE SUPPORT

The Alternate Reform Proposal attempts to reform universal service high-cost support. Under the Proposal, the identical support rule is eliminated,[72] and competitive eligible telecommunications carriers ("ETCs") would lose their support at 20% each year until it is

[69] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks omitted; emphasis added); *citing* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

[70] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43 (1983) (internal quotation marks omitted); *citing* Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 371 U. S. 168 (1962); *see also* In re Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006).

[71] Alternate Reform Proposal, ¶ 248. In fact, the only "evidence" to support a move to the new standard involves: (1) a *national* weighted average estimate by Sprint Nextel filed in September 2008, utilizing the TELRIC methodology, of UNE rates for unbundled switching and common transport; (2) a statement filed by three economists that modern circuit switches are essentially non-traffic sensitive and that the incremental costs of increasing capacity on a fiber optic cable is low; and (3) estimates by AT&T of the incremental cost of a modern softswitch, submitted October 2008 (¶¶ 249-252).

[72] Alternate Reform Proposal, ¶ 51.

phased out completely at the end of the fifth year.[73] High-cost support for non-rate-of-return ILEC ETCs would be capped at their December 2008 levels, and the same support would be capped for rural rate-of-return ILECs beginning in 2010.[74] As a condition for continued receipt of high-cost funds, all ILECs must commit to offer broadband Internet access throughout their supported service areas to all customers within 5 years.[75] If ILECs fail to commit for a particular service area, then that area will be deemed an "Unserved Service Area" subject to a reverse auction open to all ETCs.[76] Once support is transferred to a winning bidder on the area, the ILEC will be relieved of its carrier of last resort ("COLR") obligations at both the state and federal levels.[77] If the auction does not produce a winner, then the FCC would reexamine the area to determine whether the frozen high-cost support amount is sufficient and, if not, then will determine what additional steps would need to be taken to ensure that the area is served by a provider that will meet the broadband commitment and COLR requirements.[78] Both auction winners and certifying ILECs would have milestone build-out requirements.[79]

As an initial matter, the MDTC supports reform of the universal service high-cost support mechanism that would promote economic efficiency and fairness, and believes that the current mechanism is no longer financially sustainable. The MDTC, however, cannot lend its support to the Alternate Reform Proposal's high-cost support reform plan. The MDTC supports a cap on

[73] Alternate Reform Proposal, ¶¶ 12, 17, 51, 52.

[74] Alternate Reform Proposal, ¶¶ 12 and 16.

[75] Alternate Reform Proposal, ¶¶ 18, 22, 28.

[76] Alternate Reform Proposal, ¶¶ 18, 31, 41.

[77] Alternate Reform Proposal, ¶¶ 31, 41, 47.

[78] Alternate Reform Proposal, ¶¶ 47.

[79] Alternate Reform Proposal, ¶¶ 55-58.

high-cost support and elimination of the identical support rule. Complete elimination of support to competitive ETCs, however, is patently discriminatory and unfair in that it provides ILECs with an unfair competitive advantage in rural areas. A more appropriate approach would be for the FCC to require competitive ETCs to receive support based on their own costs and to limit the number of competitive ETCs per support area. Both of these approaches would free up funding that could be utilized in other ways, such as for support of broadband in these areas. Furthermore, the FCC should remap ILEC ETC service areas into smaller segments, where the funding mechanism "takes into account customers' ability to pay, and relative costs and rates between rural and urban areas within the state."[80] This would help to redistribute high-cost funding and permit net-contributor states such as Massachusetts to receive more high-cost funding in its rural areas.[81]

If the FCC were to incorporate broadband access into high-cost support, then it should establish a separate broadband fund for that purpose. Rather than adopt the Alternate Reform Proposal's guaranteed monopoly approach to broadband expansion in rural areas, the MDTC recommends that the FCC adopt the creation of a Broadband Fund comparable to that proposed

[80] Massachusetts Dept. of Telecommunications and Energy ("MDTE") Initial Comments, *In the Matter(s) of Federal-State Joint Board on Universal Service* and *High-Cost Universal Service Support*, CC Docket No. 96-45 and WC Docket No. 05-337, at 15-16 (filed March 27, 2006); MDTE Reply Comments, *In the Matter(s) of Federal-State Joint Board on Universal Service* and *High-Cost Universal Service Support*, CC Docket No. 96-45 and WC Docket No. 05-337, at 3 (filed May 26, 2006). The MDTE is the predecessor agency of the MDTC.

[81] The MDTC reiterates its position that "[u]niversal service policy should be designed to maintain or increase subscribership – not to transfer wealth from low-cost to high-cost regions." MDTE Reply Comments, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 5 (filed July 20, 2005); MDTE Reply Comments, CC Docket Nos. 96-45 and 97-160, and DA 98-715, at 2 (filed May 29, 1998). For instance, Massachusetts service providers received a total of $40,978,000 in USF payments (only $2.8 million towards high-cost support) in 2006, but their contributions totaled $156,510,000. *Universal Service Monitoring Report*, CC Docket No. 98-202, at 1-27, Table 1.12, and at 3-27, Table 3.14 (rel. June 2007) ("Monitoring Report").

by the Federal-State Joint Board on Universal Service.[82] The MDTC agrees with the Joint Board's recommendation that a Broadband Fund should be:

> "tasked primarily with disseminating broadband Internet services to unserved areas, with the support being expended as grants for the construction of new facilities in those unserved areas. A secondary purpose would be to provide grants for the new construction to enhance broadband service in areas with substandard service. Another secondary purpose would be to provide continuing operating subsidies to broadband Internet providers serving areas where low customer density would suggest that a plausible economic case cannot be made to operate broadband facilities, even after receiving a substantial construction subsidy."[83]

The MDTC further agrees that "states are better suited than the Commission to effectively administer" the program and that the "monies first be allocated to the states, and thereafter awarded by designated state agencies to finance particular construction projects or the operations of broadband providers."[84] Available funding should not be limited to telecommunications carriers but should be made available, as deemed a strategic investment by the states, to any type of company that is capable of supporting broadband deployment. In addition, any available funding should be permitted to augment any state funding that may be provided.[85] Such an

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[82] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, (JB 2007) ("Comprehensive Reform Recommended Decision").

[83] Comprehensive Reform Recommended Decision, ¶ 12.

[84] Comprehensive Reform Recommended Decision, ¶ 14.

[85] For instance, in August Massachusetts Governor Deval Patrick signed into law An Act Establishing and Funding the Massachusetts Broadband Institute and Broadband Incentive Fund – legislation that leverages public and private resources to make high-speed Internet available in the state's 32 communities that currently lack access to broadband. The new law calls for the expansion to be completed within the next three years. The new law will bridge the digital divide that persists predominantly in western Massachusetts by providing $40 million in bonds from the new Broadband Incentive Fund to construct fiber, wireless towers and other critical and long-lived broadband infrastructure. Targeted state investments will attract and complement private sector investment, making it more cost-effective for private providers to deliver complete solutions for customers in regions without broadband coverage. *See* "Governor Deval Patrick Signs Broadband Access Law," Massachusetts Office of Consumer Affairs and Business Regulation Press Release, rel. August 4, 2008, available at http://www.mass.gov/?pageID=ocapressrelease&L=4&L0=Home&L1=Government&L2=Our+Agencies+and+Divi

approach would better encourage and support broadband deployment in rural areas than that provided by the Alternate Reform Proposal.

B. REFORM OF UNIVERSAL SERVICE CONTRIBUTIONS

The MTDC recognizes that the Alternate Reform Proposal's reform plan essentially mirrors the one presented in the Narrow Universal Service Reform Proposal regarding residential customers and discusses a business contribution methodology that would actually be implemented under the Narrow Universal Service Reform Proposal. For that reason, the MDTC's comments in this section apply equally to both proposals, though citations will focus on the Alternate Reform Proposal.

Under the Alternate Reform Proposal, a new, numbers-based assessment methodology for residential end-users would be implemented on all "assessable numbers," regardless of the technology or service (cable, VoIP, wireless or wireline).[86] There would be a fixed rate of $1.00 per residential number per month, which responsible entities would be permitted to "pass-through" to their end-users.[87] The entity responsible for payment would be the provider with the retail relationship with the end-user.[88] Only qualifying Lifeline customers are exempted from contribution.[89] A separate, connections-based methodology would be implemented for business services,[90] but the Alternate Reform Proposal seeks comment on the methodology's

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sions&L3=Department+of+Telecommunications+and+Cable&sid=Eoca&b=pressrelease&f=080804_broadband&csid=Eoca.

[86] Alternate Reform Proposal, ¶¶ 88, 104, 111, 122.

[87] Alternate Reform Proposal, ¶¶ 88, 93, 100.

[88] Alternate Reform Proposal, ¶ 113.

[89] Alternate Reform Proposal, ¶¶ 136-137.

[90] Alternate Reform Proposal, ¶¶ 88, 93, 126.

implementation.[91] An alternate methodology (TracFone's "USF by the Minute") would be adopted for wireless prepaid plans.[92] The FCC would develop and implement a new reporting system, under which contributors are to report on a monthly basis their residential "assessable number" count.[93] There would be a 12-month transition to the new methodology before "assessable number" contributions would begin, but during which time (July 2009) contributors would be expected to double-report based on old and new requirements.[94]

The MDTC is hesitant to support the contribution reform plan because there is insufficient data to permit the MDTC to support it. The Alternate Reform Proposal, as well as the Narrow USF Reform Proposal, presents an arbitrary contribution amount for residential "assessable numbers." Nowhere does the Proposal provide estimates as to expected contributions. The MDTC is concerned that any new contributions method that does not provide up-front estimates will result in even greater contributions than our state already pays and, yet, the state will receive no additional benefit from the payout.[95] For that main reason, the MDTC cannot offer its support of the plan.

In the interests of fairness, the FCC should implement a new reporting requirement prior to implementing a new contributions methodology. Since the Alternate Reform Proposal seeks comment on the best way to implement the connections-based methodology for business

[91] Alternate Reform Proposal, ¶¶ 88, 127.

[92] Alternate Reform Proposal, ¶ 133.

[93] Alternate Reform Proposal, ¶¶ 143-144.

[94] Alternate Reform Proposal, ¶¶ 149-151.

[95] This concern is strengthened if the arbitrary amounts for business "connections" listed in the Narrow Universal Service Reform Proposal are adopted. In the alternative, there is also the possibility that the new contributions methodologies will not be sufficient to cover the December 2008 caps.

services, such a request should also be extended to residential "assessable number" contributions. Meanwhile, the FCC should require that providers begin to file their "assessable number" and "assessable connections" counts (for residential and expected business) for a 12-month period. The FCC should then issue a report of the consolidated data, broken down by state, in order to help better determine appropriate contributions.

Finally, since such a system would, arguably, be easier to administer, then the FCC should apply a comparable system to Telecommunications Relay Service contributions, rather than require the USAC to maintain separate systems (and carriers to maintain separate reporting requirements).

C. BROADBAND FOR LIFELINE/LINK-UP CUSTOMERS

The Alternate Reform Proposal would establish a Pilot Program to determine how Lifeline/Link Up can be used to enhance access to broadband Internet access service for low-income people.[96] The Program would be available on a "first-come, first-served" basis nationwide,[97] with $300 million to be made available each year for the next three years.[98] The money would be for ETCs to support broadband Internet access service and the necessary "access devices,"[99] limited to one subsidy per household.[100] The Program would have specific ETC reporting requirements.[101]

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[96] Alternate Reform Proposal, ¶¶ 60 and 67.

[97] Alternate Reform Proposal, ¶ 81.

[98] Alternate Reform Proposal, ¶ 60.

[99] Alternate Reform Proposal, ¶¶ 60, 77, 78.

[100] Alternate Reform Proposal, ¶¶ 76-77.

[101] Alternate Reform Proposal, ¶¶ 84-86

If the FCC intends to reform the Lifeline/Link-Up program, then it need not institute a limited Pilot Program for broadband services. Instead, the MDTC recommends only that Lifeline/Link-Up be reformed to permit consumers to use the subsidy in the most cost-effective method for them and which would not lock them into any one technology. In other words, Lifeline/Link-Up should be made available for a variety of phone services, one subsidy per household, which can be used for wireless, wireline, a broadband connection, or a bundled package.

IV. CONCLUSION

The MDTC again applauds the FCC for its collaborative reform approach. In closing, the MDTC recommends that the FCC take the time to meaningfully review the comments that it receives in order to best implement a reform policy for both ICC and USF. Only this method can result in reform that best acts in the public interest.

Respectfully submitted,

Commonwealth of Massachusetts
Department of Telecommunications and Cable

By:

_____/s/_____
Sharon E. Gillett, Commissioner